



New England Legal Foundation

PROVIDING A BALANCE

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September 15, 2014

BY HAND

The Honorable Janet L. Sanders
c/o Antitrust Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Re: *Commonwealth v. Partners Healthcare System, Inc., South Shore
Health and Educational Corp., and Hallmark Health Corp.*,
No. 14-2033-BLS

Dear Judge Sanders:

I write on behalf of the New England Legal Foundation, in response to your invitation to the public to submit comments concerning the Final Judgment by Consent that has been proposed in this case by the Massachusetts Attorney General and Partners Healthcare System, Inc. Specifically, NELF writes to comment on the legal standard that it believes the Court should apply when considering whether to enter the Final Judgment by Consent as a judgment of the court. NELF's comments are confined to that particular topic, and they should not be construed as extending, in any way, to the merits of the proposed judgment.

NELF is a nonprofit, nonpartisan public interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. NELF is the only non-profit, public interest law firm in the region whose mission focuses on promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic and property rights. In pursuit of its mission, when it believes that it would be helpful to the courts to do so, NELF files amicus curiae briefs in the appellate courts of Massachusetts and the other New England states, as well as in federal courts, including the Supreme Court of the United States. In its briefs, NELF argues as a public interest courtroom advocate for the business community of New England.

It is also as a public interest advocate for the New England business community that NELF is filing a comment in this matter. NELF's supporters have an interest in the standards to be applied when a court is called upon to review a proposed consent judgment which is the fruit of intensive arms' length negotiations between a business, in this case Partners, and the Commonwealth's highest law enforcement authority. Given the strong public policy favoring the reasonable settlement of disputes, it is important, in NELF's view, that judicial review should be balanced and respectful of a business's expectation that, absent extraordinary circumstances, a fairly negotiated settlement agreement entered into with the highest governmental authorities will be approved and enforced by the courts.

Accordingly, NELF has reviewed the submissions of the Attorney General and Partners in which they set out the legal standard they believe should guide the Court in its deliberations. After careful review of the authorities cited by the Attorney General and Partners, as well as a review of other legal authorities, NELF believes that the Attorney General and Partners state consensus principles, drawn from a variety of federal and state cases, that have guided other courts in a range of similar situations and that ought to guide this Court as well.

Generally speaking, as set out in the parties' briefing, there are two sets of concerns about which the Court must satisfy itself in this case. First, there are core judicial concerns. These include whether the proposed terms of the judgment are clear; whether they reasonably relate to issues in dispute over which the court has jurisdiction; whether the terms of any possible future enforcement envisioned under the consent judgment are clear; whether the enforcement itself would be adequate and manageable; and whether the consent judgment was the product of genuine adversarial negotiations, and not of collusion or improper influence. The second set of concerns may be subsumed under the rubric of the public interest. Here, the Court should satisfy itself that the judgment does not clearly violate any well-established public policy, taking due account of the Attorney General's unique discretionary powers in protecting the public interest through the prosecution and settlement of law suits. (Indeed, in G.L. c. 6D, § 13(h), inserted by c. 224, § 15 of the Acts of 2012, the Legislature has recently reaffirmed this discretion specifically as to healthcare providers and anti-competitive conduct under G.L. c. 93A.) Finally, NELF notes that the comment period the Court instituted in this case is especially helpful because it affords the public at large an opportunity to comment on the effects the proposed judgment may have on third parties.

One point that may deserve particular emphasis is that the proposed consent judgment does not rest on either a finding or an admission of liability. The U.S. Supreme Court cautioned in one antitrust case, "Because the defendant has, by the

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decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.” *U.S. v. Armour & Co.*, 402 U.S. 673, 682, 91 S.Ct. 1752, 1757 (1971). *Accord U. S. v. ITT Continental Baking Co.*, 420 U.S. 223, 235, 95 S.Ct. 926, 934 (1975); *S.E.C. v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 295 (2d Cir. 2014); *Thatcher v. Kohl’s Dept. Stores, Inc.*, 397 F.3d 1370, 1375 (Fed. Cir. 2005); *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996); *Angela R. by Hesselbein v. Clinton*, 999 F.2d 320, 325 (8th Cir. 1993).

NELF hopes that this comment will be helpful to the Court, and I thank the Court for its attention to NELF’s concerns.

Respectfully,



Martin J. Newhouse
President,
New England Legal Foundation